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In The
SUPREME COURT OF THE UNITED STATES
January Term, 1985

CITY OF NORTH MUSKEGON,
a Michigan municipal corporation;
NORTH MUSKEGON POLICE DEPARTMENT,
CITY COUNCIL, and POLICE CHIEF, Petitioners.

vs.

RICHARD BRIGGS, Respondent.

On Appeal From the United States Sixth Circuit Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI

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Now comes Respondent, Richard Briggs, by and through his attorney, Jeffery T. Ross and moves pursuant to Rule 22 of the Rules of the Supreme Court of the United States, that the petition for Writ of Certiorari herein be denied on the ground that the question on which the decision of the cost depends is so unsubstantial as not to require further argument. This Respondent also moves this Honorable Court to award costs and attorney's fees along with post-judgment interest.

OPINION BELOW

The challenged decisions of the U.S. District Court Western Division, Michigan of May 5, 1983, the judgment of the U.S. District Court Western Division, Michigan of May 26, 1983 and the opinion of the U.S. Sixth Circuit Court of Appeals affirming the decision of the District Court entered on October 2, 1984, are set forth in the appendix of Petitioners' brief. The jurisdictional requirements are set forth in the Petitioners' jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are set forth in Respondent's jurisdictional statement except that Petitioners have failed to provide this Honorable Court the entire body of the "Adultery Statute M.C.L.A. § 750.29". Petitioners during trial, in subsequent appeal has failed to cite the above statute en toto.

Michigan Compiled Laws, Section 750.29 et seq. as a whole reads as follows:

"Sec. 29. Definition. Adultery is the sexual intercourse of two (2) persons, either of whom is married to a third person. Sec. 30. Punishment; application to unmarried man. Any person who shall commit adultery shall be guilty of a felony; and when the crime is committed between a married woman and a man who is unmarried, the man shall be guilty of adultery, and liable to the same punishment. Sec. 31. Complainant and time prosecution to be commenced. No prosecution for adultery, under the preceding section, shall be commenced, but on the complaint of the husband or wife; and no such prosecution shall be commenced after one (1) year from the time of committing the offense. Sec. 32. Cohabitation by divorced parties as adultery. If any persons after being divorced from the bonds of matrimony for any cause whatever, shall cohabit together, they shall be liable to all the penalties provided by law against adultery."

COUNTER-STATEMENT OF THE CASE

Petitioner, City of North Muskegon is a Michigan municipal corporation. Its size has no bearing regarding the legal issues of this case but was possibly relevant regarding the factual allegations made by the City of North Muskegon. However, the proofs presented at trial by the Petitioners were insufficient.

At the times relevant to this case, the Petitioners' police department employed 3 - 4 full time officers along with 6 part-time officers. Richard Briggs was employed as a part-time police officer with the City of North Muskegon from 1969 until his dismissal of February, 1977. He was employed on a full time basis with the Howmet Corporation in the payroll department.

Contrary to Petitioners' statement of facts, Mr. Briggs did receive formal police training and was certified through the State of Michigan as a police officer.

In January of 1977, Mr. Briggs moved from his marital residence and moved into an apartment with Cynthia Secrest, a fellow Howmet employee, within the City of North Muskegon.

Mr. Briggs and his former wife proceeded with a divorce action which an order was entered in October of 1977.

Mr. Briggs on his own advised the North Muskegon Police Chief, Harold Mirkle, that he had separated from his wife and was cohabitating with Cynthia Secrest. No action against Mr. Briggs was taken by the Police Chief, no written rules or policies regarding off-duty conduct had been promulgated by the City of North Muskegon. Nor was it apparent to the members of the community and fellow officers that Mr. Briggs' ability to perform as a police officer was compromised or diminished in any fashion.

On February 15, 1977, Mr. Briggs was suspended from the North Muskegon Police Department until "such time as his conduct was not unbecoming as an officer". Mr. Briggs apparently would be reinstated if he ceased living with Cynthia Secrest and or move out of the jurisdictional limits of the City of North Muskegon. On July 1, 1977, Mr. Briggs was terminated as of the date of his suspension.

On Mr. Briggs' request, the city commissioners held a hearing along with the city attorney, Harry J. Knudsen, to determine whether his employment should be reinstated. That hearing was held on August 29, 1977. Mr. Knudsen, on behalf of the City of North Muskegon, informed Mr. Briggs that his non-marital cohabitation with Cynthia Secrest violated the state adultery statute and the state "lewd and lascivious" misdemeanor statute. At the time of the hearing there were no proofs presented that Mr. Briggs' living situation had any effect on his ability to perform as a police officer. Again no written policy or regulation other than the vague assertions that his conduct was "unbecoming of a police officer for the City of North Muskegon" and the criminal statutes here before cited.

Mr. Briggs was never formally charged with violation of either statute nor was it shown at trial that the statutes had been violated or that his performance as a police officer had been compromised in any manner.

At the trial held on January 4th and 5th, 1983, the City of North Muskegon failed miserably in an attempt to show that Mr. Briggs ability to make important judgements as a police officer were effected by his off-duty activities. All police officers and supervisors called by the Petitioners readily admitted that Richard Briggs was considered a very good police officer. They apparently were sodesperate to prove their allegations regarding Mr. Briggs' ability to perform that they brought up the fact that Mr. Briggs was sent by his employer to see a psychiatrist. The testimony indicated that

the Petitioners did not know why the Respondent saw a psychiatrist or for what reason but were willing to use such a situation to infer through innuendo an unsubstantiated proof that his living situation somehow effected or would effect his ability as a police officer. However as the testimony clearly showed, Mr. Briggs was sent to a psychiatrist by his full time employer as part of their regular required reviews of employees who are entrusted in supervisory positions with large sums of money. Much of the other evidence presented by Petitioners at the trial were vague accounts of incidents that may have occurred after Mr. Briggs' suspension. The trial court had an opportunity to hear and "see" the testimony as it developed. The trial court's decision regarding these and other factual matters was reviewed and upheld by the U.S. Sixth Circuit Court of Appeals.

Mr. Briggs was not in violation of either the "adultery" or "lewd and lascivious" cohabitation statutes. Adultery is only a crime in the State of Michigan if the wronged spouse files a complaint. The former Mrs. Briggs testified at the trial that she understood at the time Mr. Briggs' reasons for wanting to end the marriage and had no objection to his subsequent living situation. In fact, the former Mrs. Briggs was Respondent's best witness. She testified regarding his stability as an individual, his caring as a father and his ability to perform as a competent police officer. Certainly, if anyone was in a better position to testify regarding Mr. Briggs' character and ability to perform as an police officer, it would have been his former wife.

The factual allegations made at the trial regarding the proposition that Mr. Briggs violated the "lewd and lascivious" cohabitation statute was not shown, and reviewed and affirmed by the U.S. Sixth Circuit Court of Appeals.

The Petitioners' determination to suspend and ultimately fire Mr. Briggs was not based upon a violation of state statute but rather merely used as a pretext to force Mr. Briggs to either cease living with Cynthia Secrest or move with her outside the city limits of North Muskegon.

PROCEDURAL HISTORY

The Petitioners have set forth a procedural history on pages 7 and 8 of their request for Writ of Certiorari which appears to be correct except for the following:

That on May 20, 1981, the trial court dismissed Respondent's claim on 42 U.S.C. § 1981 and 2000E et. seq. The trial court did not dismiss Respondent's claim under 42 U.S.C. § 1983 as represented in Respondent's procedural history.

Contrary to Petitioners' assertions that the trial court, sua sponte grounded or characterized Respondent's claims as being brought under the constitutionally protected rights of privacy and association. The court found the pleadings sufficient to imply through paragraph 4 and subsequent paragraphs that the complaint alleged that this matter was being brought under such constitutional guarantees.

The argument in support of Respondent, originally filed with the trial court regarding the validity of his claim is contained in this appendix.

ARGUMENT

Much of Petitioners' brief is based upon the erroneous conclusion that Mr. Briggs' activities constituted a crime. These factual matters have been answered by the trial court and reviewed by the Sixth Circuit Court of Appeals. The Respondent is of the opinion that the factual context of this case is dissimilar to and distinguishable from Shawgo v. Spradlin, 701 F.2d 470 (1983); Petition for Certiorari denied November 7, 1983, 78 L. Ed 2d 345 (1984).

The court in Spradlin recognized the right of privacy and association. However in Spradlin the Amarillo Police Department was able to demonstrate a rational connection between a specific regulation (cohabitation of two police officers or proscribing a superior officer from sharing an apartment with one with lower rank) in an effort to avoid appearances of impropriety and disciplinary problems. In the matter before this court, the City of North Muskegon did not have any regulations regarding off-duty conduct. Cynthia Secrest wasn't a police officer nor did she work for the City of North Muskegon. Their lives and jobs were with regards to Respondent's police officer position, not so entwined as to create a problem in discipline or ability to perform.

Petitioner continually focuses on extra-marital sexual activities. However, it was clear to the trial court as it is to Respondent that his cohabitation with Cynthia Secrest was not only for sexual activities. Furthermore, Respondent's cohabitation was not felonious nor lewd and lascivious. Rather it was a healthy relationship between two adults. This living arrangement as the trial court found had no effect or relationship to Respondent's ability to perform as a police officer.

This case implicates what Justice Brandice describes as:

"The right to be left alone - the most comprehensive right and the most valued by civilized men." Olmstead v. United States, 22 U.S. 438, 478 (1928) (dissenting opinion).

Precisely because the right to be left alone is a sine qua non of civilized living, the framers of the Bill of Rights spread a broad blanket of protection over the fundamental values of privacy and personal autonomy. The right of privacy and association is expressly protected by the 1st, 3rd, 4th, and 5th Amendments to the Constitution. The present action, was brought pursuant to 42 U.S.C. § 1983 which affords Respondent these protections.

In Spradlin, the lower court did find that the officers involved had the benefit of the right of privacy and association. See Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972). The Spradlin court like the trial court in this matter recognized that these rights are not unqualified. The trial court in this matter looked for but found no relationship or effect on Respondent's ability to perform his duty as a police officer. The only real difference between Spradlin and this matter is the Amarillo Police Department provided a factual basis in which to prohibit certain activities. In this matter the Petitioners failed to provide a factual reason why discipline of any measure should have been exercised.

Clearly the division that Petitioners asserts exists between the different courts is primarily a division of decisions regarding findings of fact not the application of general principles of law.

CONCLUSION

For all the foregoing reasons, Respondent prays that the motion for Writ of Certiorari be denied and costs and attorney's fees if not waived by this Honorable Court be awarded along with post-judgment interest.

Date: May 8, 1985

[Signature]
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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorney of record of all parties to the above cause by mailing the same to them at their respective business addresses as disclosed by the pleadings of record herein with postage prepaid thereon on the 15 day of May, 1985.

Subscribed and sworn to before me
 this 15 day of May, 1985.
[Signature]
 Notary Public, State of MI KENT
 6-24-87